80-1610

No. 80-

Office-Supreme Court, U.S.
FILED
APR 22 1981
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DENNIS J. ROBERTS II, ET AL.,
Appellants

v.

NEW HAMPSHIRE PUBLIC
UTILITIES COMMISSION, ET AL.,
Appellees

On Appeal From The Supreme Court Of
The State of New Hampshire

MOTION OF THE STATE OF NEW HAMPSHIRE AND NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION TO DISMISS OR AFFIRM

Gregory H. Smith
Attorney General

David William Jordan
Assistant Attorney General
Counsel of Record

208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

April 1981

Table of Contents

	Page
Table of Authorities.....	ii
Statement.....	2
Conclusion.....	11

Table of Authorities

Cases	Page
Public Utilities Commission v. Attleboro Steam and Electric Co., 273 US 83 (1927).....	6
United States Constitution	
Art. I, Sec. 9, cl. 3.....	8
Art. IV, Sec 2, cl. 1.....	7
Amend. 10.....	9,10
Federal Power Act	
Part I.....	4
Part II.....	6-7
Sec. 201(b) (16 USC 824(b)).....	5,7,8,10

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

DENNIS J. ROBERTS II, ET AL.,
Appellants

v.

NEW HAMPSHIRE PUBLIC
UTILITIES COMMISSION, ET AL.,
Appellees

MOTION TO DISMISS
OR AFFIRM

The appellees State of New Hampshire and New Hampshire Public Utilities Commission respectfully move to dismiss the captioned appeal or affirm the judgment of the Supreme Court of the State of New Hampshire on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is the third appeal from the decision of the New Hampshire Supreme Court upholding an order of the New Hampshire Public Utilities Commission. That order required the New England Power Company to sell the power generated at several Connecticut River hydroelectric generating stations to consumers in the State of New Hampshire. The generating stations in question are owned by the Company, and are located within the State of New Hampshire.

The New England Power Company and the Commonwealth of Massachusetts have already appealed the decision of the New Hampshire Supreme Court to this Court. Those appeals are listed upon the docket of this Court as numbers 80-1208 and 80-1471, respectively.

In the instant appeal, the appellants, officials of the State of Rhode Island, adopt as their own the jurisdictional statements filed in this Court by the New England Power Company and the Commonwealth of Massachusetts. The Rhode Island appellants assign no errors and make no arguments not contained in the jurisdictional statements of the other appellants.

The State of New Hampshire and the New Hampshire Public Utilities Commission timely moved this Court to either dismiss the appeals of the New England Power Company and the Commonwealth of Massachusetts or affirm the judgment of the Supreme Court of the State of New Hampshire. Those motions clearly demonstrate that the judgment of the Supreme Court of the State of New Hampshire

is correct, and that the questions presented to this Court in these three appeals are so unsubstantial as not to warrant further argument.

The attention of the Court is invited to the State's motions to dismiss or affirm. Briefly, the State of New Hampshire shows in those motions that the order of the New Hampshire Public Utilities Commission, under review in this appeal, is the lawful exercise of an authority delegated by the Congress of the United States to the State of New Hampshire. Contrary to the claims of the appellants, Part I of the Federal Power Act does not preempt the exercise of that authority by the State of New Hampshire. The area preempted by the United States pursuant to Part I of the Federal Power Act is the licensing of projects upon the navigable

rivers of the United States. Nothing in the order of the New Hampshire Public Utilities Commission affects the licensing of any hydroelectric project upon the Connecticut River. The order deals only with the sale of power generated at any facility properly licensed by the United States.

Further, as it is authorized to do, the Congress has delegated to the State of New Hampshire the authority to regulate a narrow segment of interstate commerce in hydroelectric energy. That such a delegation has been effected is apparent from the words of Section 201(b) of the Federal Power Act (16 USC 824(b)), from its context, and from the timing of its enactment.

The authority delegated to the State of New Hampshire by that section is as plenary within its own limits as is the

authority conferred generally upon the Federal Energy Regulatory Commission by the remainder of Part II of the Federal Power Act. Pursuant to that delegated authority, the State of New Hampshire may regulate the rates, terms, and conditions of sale of hydroelectric power generated in New Hampshire, and sold at wholesale to other utilities in New Hampshire.

Nothing contained in Public Utilities Commission v. Attleboro Steam and Electric Company, 273 US 83 (1927), compels a different conclusion. The inherent prohibitory effect of the commerce clause is very narrow. On the other hand, the permissive authority contained in that clause, which the Congress may delegate to a State, is very broad. Attleboro, above, prohibited only the State regulation of the price at which electric energy, generated in one State, is sold in another State at

wholesale. Consequently, even in the absence of Section 201(b) of the Federal Power Act, the State of New Hampshire would be authorized to regulate the selling price of power both which is both generated and sold within the State of New Hampshire. Thus, the otherwise exclusive rate-making authority vested in the Federal Engergy Regulatory Commission by Part II of the Federal Power Act does not preempt the order of the New Hampshire Public Utilities Commission now under review.

The order of the New Hampshire Public Utilities Commission now under review is consistent with the privileges and immunities clause of the United States Constitution. Art. IV, Sec. 2, cl. 1. That clause provides only that citizens of one State, when in another State, shall enjoy in the host State the same privileges which the citizens of the host State there

enjoy. The order of the New Hampshire Public Utilities Commission now under review does not deprive any citizen of the State of Rhode Island, located in New Hampshire, the right to purchase, on terms equivalent to those enjoyed by the citizens of New Hampshire, energy generated at the hydroelectric facilities located in the State of New Hampshire. To give credence to the argument of the appellants, would have this Court mandating that the State of New Hampshire confer benefits upon citizens of other States at locations well beyond the borders of the State of New Hampshire. That the United States Constitution does not require.

Lastly, Section 201(b) of the Federal Power Act (16 USC 824(b)) is a valid exercise of the power of the Congress of the United States pursuant to the commerce clause. Art. I, Sec. 9, cl. 3.

The Congress may address a particular problem by several different means, and may condition the exercise of delegated congressional authority upon a showing of willingness and competence to exercise that authority. Thus, when the Congress sought to regulate the sale of electric energy at wholesale, it recognized the demonstrated willingness of some States by authorizing those States to perform that regulation, while providing a federal agency to perform that regulation in those other States which had not demonstrated the willingness or the competence to do so.

The limits upon congressional power to regulate interstate commerce are found only in the United States Constitution. The only limit which these appellants have standing to raise before this Court is the reservation of power in the States by the Tenth Amendment to the United States

Constitution. Clearly, the regulation of interstate commerce, having been expressly conferred upon the United States, was not reserved to the States by the Tenth Amendment. The only enactment of Congress which would contravene the Tenth Amendment would be an enactment which, addressing States as States, deprived those States of attributes which would be essential to their separate and independent existence. Section 201(b) does not affect at all the existence of the State of Rhode Island. Further, the Rhode Island officers who are the appellants in the instant appeal, appear upon behalf of the citizens of Rhode Island, and, therefore, lack standing in their representative capacity to urge the unconstitutionality of an enactment of the Congress. With regard to the citizens of Rhode Island, in their relationship to the

United States, it is the United States which stands parens patriae to those citizens.

CONCLUSION

For the reasons stated herein, and more fully set forth in the State's motions to dismiss or affirm in Nos. 80-1208 and 80-1471, either this appeal should be dismissed or the judgment of the Supreme Court of the State of New Hampshire should be affirmed.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Gregory H. Smith
Attorney General

David William Jordan
Assistant Attorney General
Counsel of Record

208 State House Annex
Concord, New Hampshire 0330
(603) 271-3658